



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 833 (N) OF 2009

**BETWEEN**

KENYA SCIENTIFIC, RESEARCH INTERNATIONAL

TECHNICAL AND ALLIED INSTITUTIONS WORKERS'

UNION..... CLAIMANT

**VERSUS**

FLAME TREE BRANDS LIMITED..... 1<sup>ST</sup> RESPONDENT

FLAME TREE AFRICA LIMITED..... 2<sup>ND</sup> RESPONDENT

MRS. HERIL BANGERA.....3<sup>RD</sup> RESPONDENT

*Rika J*

CC. Leah Muthaka

*Mr. Martin Oduor Secretary General of the Claimant Union appearing for the Claimant*

*Mr. Kaguru Advocate instructed by Mwangambo & Okonjo Advocates for the Respondent*

ISSUE IN DISPUTE: REDUNDANCY

AWARD

1. This Claim was instituted by the Claimant Union, through a Statement of Claim filed in Court on 24<sup>th</sup> December 2009. It is brought on behalf of 10 Members of the Claimant Union Samson Mputhia Mwathi, Peter Kariuki Komu, Albano Mogendi Mochiemo, Jackson Mulinge Musyoki, David Kioko Kithisya, Edward Musyula Muindi, John K Nzioka, Charles Kakai, Lazaro Kilonzo and Daniel Wanyama [hereinafter referred to as the Grievants]. They claim that they were employed by the 1<sup>st</sup> Respondent in various capacities, and had their respective positions declared redundant, after the 1<sup>st</sup> Respondent changed its registration to become the 2<sup>nd</sup> Respondent, and after the employees demanded to be paid terminal dues by the outgoing business. The Claimant prays the Court to grant Orders that:-

- a. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents pay the 10 Grievants their redundancy dues;
- b. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents to reinstate the Grievants to their previous positions without loss of

salaries and benefits; and

- c. In the alternative, the Respondents pay compensation the equivalent of 12 months' salary to each Grievant.

2. The Respondents filed a joint Statement of Reply on 23<sup>rd</sup> November 2011. The Respondents concede they reorganized their business by incorporating the 2<sup>nd</sup> Respondent. The Grievants were advised that they would continue to work normally, and earn their respective salaries uninterrupted by the reorganization. There would be no need to pay them terminal benefits, as none had their contract terminated. The Grievants would not hear any of this, and went on an illegal strike. They incited other employees to join the strike. While the other employees abandoned the strike and went back to work, the Grievants persistently refused to work. There is no position that was declared redundant, but rather the employees deserted their positions. The Respondents subsequently attended conciliation meetings at the Ministry of Labour. In the end the Respondents paid all the salaries and benefits due to the Grievants at the Ministry of Labour. No employee was dismissed by the Respondents, and no position was declared redundant; the Grievants simply deserted, and have no valid Claim against the Respondents. The Respondents pray for dismissal of the Claim with costs to the Respondents.

3. The Claimant called one of the Grievants Jackson Mulinge Musyoki who testified on 10<sup>th</sup> November 2011. The Respondents called two of their employees Nicodemus Kakai and Caroline Wambui, who testified on 26<sup>th</sup> March 2012. Parties also relied on their affidavits, pleadings and submissions in arguing their respective positions. The dispute was last mentioned in Court on 30<sup>th</sup> April 2013 when the Court confirmed receipt of the Parties' Closing Arguments, and Parties were advised the Court would deliver its Award on notice.

4. The Claimant explained that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are registered as Limited Liability Companies, under the Companies Act Cap 486 the Laws of Kenya. The 1<sup>st</sup> Respondent has been manufacturing and selling cosmetics within the Republic of Kenya. The 1<sup>st</sup> Respondent decided to change its name, becoming Flame Tree Africa Limited on 1<sup>st</sup> September 2008. The 3<sup>rd</sup> Respondent was the Managing Director and Agent of the 1<sup>st</sup> Respondent. She remains the Managing Director and Agent of the 2<sup>nd</sup> Respondent.

5. The employees were not informed of the change. Around September 2008, the employees mainly from the dispatch department were advised by then Production Manager James Kimani to use the new brand name on all the products. This was how they came to know of the change. Kimani promised the employees that they would be paid their terminal benefits the following month, October 2008. The employees were patient, and in May 2009, decided to see the Managing Director to press for payment of their benefits. They soon realized the Respondent was trifling with their benefits. They reported the matter to their Trade Union, who in turn referred the dispute to the Ministry of Labour. There was no settlement and the Conciliator issued the certificate of disagreement, enabling the dispute to move on to the Court for adjudication.

6. Mulinge testified he was employed by the 1<sup>st</sup> Respondent as a General Labourer, for 6 years. The company changed its name to Flame Tree Africa Limited [2<sup>nd</sup> Respondent]. Employees were informed of this change by the Production Manager and advised they would be paid their terminal benefits under the old Company. He testified on cross-examination that he worked for the Respondents for 5 years and 10 months. The employees were told by the Production Manager that the law requires they would be paid terminal benefits after the employer changed its name. Service pay was due. Employees were not told that their contracts had been terminated. They continued to work for 1 year after the change. They were dismissed on 11<sup>th</sup> May 2009. They were denied entry to the workplace. Nothing else was said to the employees. Mulinge could not remember any other event that took place at the time the employees were locked out. There was no strike action. 10 employees, and not 7, were dismissed. A letter from the Claimant to the 3<sup>rd</sup> Respondent dated 3<sup>rd</sup> June 2009, referred to 7 Grievants, not 10. The witness was not able to say if a fellow employee Caroline Wagocho received her terminal benefits. He clarified on redirection that there were 10 Grievants at the time the dispute was reported to the Minister for Labour.

The Production Manager told the employees they would be paid their terminal benefits. The Claimant urges the Court to allow the Claim.

7. Nicodemus Kakai testified he has worked with the Respondents from 2006. The business operated under the name of the 1<sup>st</sup> Respondent initially, later changing to operate under the 2<sup>nd</sup> Respondent. All claims from the employees under the old company were paid after the change of name. Kakai testified on cross-examination that there was no letter transferring employees from one entity to the other. There was no letter informing the employees about the change in the employer's business. Kakai was paid his dues, but was not able to say if others were paid. The second Respondent's witness Wambui corroborated the evidence of her co-employee Kakai on the change of name. She worked as an Operations Clerk. She does not claim anything from the Respondents. Some of the employees went on strike. Wambui did not participate in the strike. She could not recall, when cross-examined, the date the strike took place. She did not recall when the business changed its name. She could recall the names of some of the employees who engaged in the strike. The Respondent urges the Court to dismiss the Claim.

*The Court Finds and Awards:-*

8. The Grievants worked for the Respondents in various capacities. 7 of them worked as General Labourers, 2 as Chemical Feeders, and 1 as an Artisan. They worked for different number of years, ranging from 1 to 6 years. Their original employer Flame Tree Brands Limited changed its name to Flame Tree Africa Limited on or about 1<sup>st</sup> September 2008. The employer remained in the same business. There was no change of business ownership, and the change was more of a rebranding exercise, with no legal effect on the status of the employees.

9. Due to their misunderstanding of the legal effect of the rebranding exercise, the employees went demanding to be paid terminal dues. They assumed wrongly that their initial contracts of employment were brought to an end by the change in name. They asked to be paid terminal benefits, and it has been credibly stated by the Respondents, even went on strike demanding to be paid these terminal benefits. In the view of the Court, the employees had no reason to consider their respective contracts terminated. There was no redundancy situation. Change in business name, does not mean the business has ceased to exist. There was nothing done by the Respondents to suggest that the change of name was an act that interrupted the employees' continuity of service. The Respondents continued to own the business, manufacture and sell cosmetics from the same business premises, under the same Management. There were no roles phased out or diminished by the employer; there were no new roles introduced at the workplace; and no employee was notified of any form of a redundancy situation. The employees continued to earn their old salaries. They misinterpreted a business decision, which was within the employer's prerogative to make, and went on to create an unnecessary ruckus agitating for premature terminal benefits. The Court is satisfied from the evidence of Kakai and Wambui that no employee was prejudiced by the rebranding. The employees considered their contracts, without any prompting by the Respondents, to have terminated. They were in error. The Court is persuaded that they solely contributed to their eventual exit from employment through desertion. They cannot fairly claim for reinstatement. The Respondents took the reasonable option by paying what terminal benefits were due to the Grievants at the Ministry of Labour. It was not necessary in the first place that the contracts would be deemed to have been terminated; the Grievants themselves appear to have imposed termination into the employment relationship. ***In the end, the Claim is dismissed with no order on the costs. The employees may collect their terminal benefits from the Ministry of Labour.***

Dated and delivered at Nairobi this 27<sup>th</sup> day of September 2013

James Rika

Judge